

§ 4288.25

the erroneous determination was not due to any fraudulent or negligent action of the biorefinery.

(5) A biorefinery or person receiving payment under this program will be liable for any refund or related charges associated with their project due under this program.

(e) *Remedies.* The remedies provided in this subpart will be in addition to other civil, criminal, or administrative remedies that may apply.

§ 4288.25 Succession and control of facilities and production.

Any party obtaining a biorefinery that is participating in this program must request permission to participate in this program as a successor. The Agency may grant such request if it is determined that, the party is eligible, and permitting such succession would serve the purposes of the program. If appropriate, the Agency will require the consent of the previous party to such succession. Also, the Agency may terminate payments and demand full refund of payments made if a party loses control of a biorefinery whose production of heat or power from renewable biomass is the basis of a program payment, or otherwise fails to retain the ability to assure that all program obligations and requirements will be met.

§ 4288.26 Fiscal Year 2009 and Fiscal Year 2010 applications.

Any entity that submitted an application for payment to the Agency under this program prior to March 14, 2011 will have their payments made and serviced in accordance with the provisions specified in this subpart.

§§ 4288.27–4288.100 [Reserved]

Subpart B—Advanced Biofuel Payment Program General Provisions

AUTHORITY: 5 U.S.C. 301.

SOURCE: 76 FR 7967, Feb. 11, 2011, unless otherwise noted.

§ 4288.101 Purpose and scope.

(a) *Purpose.* The purpose of this subpart is to support and ensure an ex-

7 CFR Ch. XLII (1–1–12 Edition)

panding production of advanced biofuels by providing payments to eligible advanced biofuel producers.

(b) *Scope.* This subpart sets forth, subject to the availability of funds as provided herein, or as may be limited by law, the terms and conditions an advanced biofuel producer must meet to obtain payments under this Program from the United States Department of Agriculture for eligible advanced biofuel production. Additional terms and conditions may be set forth in the Program contract and payment agreement prescribed by the Agency.

§ 4288.102 Definitions.

The definitions set forth in this section are applicable for all purposes of program administration under this subpart.

Advanced biofuel. A fuel that is derived from renewable biomass, other than corn kernel starch, to include:

- (1) Biofuel derived from cellulose, hemicellulose, or lignin;
- (2) Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch);
- (3) Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste;
- (4) Diesel-equivalent fuel derived from renewable biomass, including vegetable oil and animal fat;
- (5) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass;
- (6) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass; or
- (7) Other fuel derived from cellulosic biomass.

Advanced biofuel producer. An individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or non-profit entity that produces and sells an advanced biofuel. An entity that blends or otherwise combines advanced biofuels into a blended biofuel is not considered an advanced biofuel producer under this Program.

Agency. The USDA Rural Development, Rural Business-Cooperative Service or its successor organization.

Alcohol. Anhydrous ethyl alcohol manufactured in the United States and its territories and sold either:

(1) For fuel use, rendered unfit for beverage use, produced at a biofuel facility and in a manner approved by the Bureau of Alcohol, Tobacco, Firearms, and Explosives for the production of alcohol for fuel; or

(2) As denatured alcohol used by blenders and refiners and rendered unfit for beverage use.

Alcohol producer. An advanced biofuel producer authorized by ATF to produce alcohol.

ATF. The Bureau of Alcohol, Tobacco, Firearms, and Explosives of the United States Department of Justice.

Biodiesel. A mono alkyl ester, manufactured in the United States and its territories, that meets the requirements of the appropriate ASTM International standard.

Biofuel. Fuel derived from renewable biomass.

Biofuel facility. A facility (including equipment and processes) that converts renewable biomass into biofuels and biobased products and may produce electricity.

Blender. A blender is a processor of fuels who combines two or more fuels, one of which must be an advanced biofuel, for distribution and sale. Producers who blend one or more of their own fuels are not blenders under this definition.

Certificate of analysis. A document approved by the Agency that certifies the quality and purity of the advanced biofuel being produced. The document must be from a qualified, independent third party.

Contract. Form RD 4288-2, "Advanced Biofuel Payment Program Contract," signed by the eligible advanced biofuel producer and the Agency, that defines the terms and conditions for participating in and receiving payment under this Program.

Eligible advanced biofuel producer. A producer of advanced biofuels that meets all requirements of §4288.110 of this subpart.

Eligible renewable biomass. Renewable biomass, as defined in this section, excluding corn kernel starch.

Eligible renewable energy content. That portion of an advanced biofuel's energy content derived from eligible renewable biomass feedstock. The energy content from any portion of the biofuel, whether from, for example, blending with another fuel or a denaturant, that is derived from a non-eligible renewable biomass feedstock (e.g., corn kernel starch) is not eligible for payment under this Program.

Enrollment application. Form RD 4288-1, "Advanced Biofuel Payment Program Annual Application," which is submitted by advanced biofuel producers for participation in this Program.

Ethanol. Anhydrous ethyl alcohol manufactured in the United States and its territories and sold either:

(1) For fuel use, and which has been rendered unfit for beverage use and produced at an advanced biofuel facility approved by the ATF for the production of ethanol for fuel, or

(2) As denatured ethanol used by blenders and energy refiners, which has been rendered unfit for beverage use.

Ethanol producer. An advanced biofuel producer authorized by ATF to produce ethanol.

Fiscal Year. A 12-month period beginning each October 1 and ending September 30 of the following calendar year.

Flared gas. The burning of unwanted gas through a pipe (also called a flare). Flaring is a means of disposal used when the operator cannot transport the gas to market or convert to electricity and cannot use the gas for any other purpose.

Forest biomass. Any plant or tree material produced by forest growth, such as trees, wood, brush, thinning, chips, and slash.

Incremental production. The quantity of eligible advanced biofuel produced at an advanced biofuel biorefinery in the fiscal year for which payment is sought that exceeds the quantity of advanced biofuel produced at the biorefinery over the prior fiscal year.

Larger producer. An eligible advanced biofuel producer with a refining capacity as determined for the prior fiscal

§ 4288.103

7 CFR Ch. XLII (1–1–12 Edition)

year, based on all of the advanced biofuel facilities in which the producer has 50 percent or more ownership, exceeding:

(1) 150,000,000 gallons of liquid advanced biofuel per year; or

(2) 15,900,000 MMBTU of biogas and solid advanced biofuel per year.

Payment application. Form RD 4288–3, “Advanced Biofuel Payment Program—Payment Request,” which is submitted by an eligible advance producer to the Agency in order to receive payment under this Program.

Quarter. The Federal fiscal time period for any fiscal year as follows:

(1) 1st Quarter: October 1 through December 31;

(2) 2nd Quarter: January 1 through March 31;

(3) 3rd Quarter: April 1 through June 30; and

(4) 4th Quarter: July 1 through September 30.

Renewable biomass.

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) that:

(i) Are byproducts of preventive treatments that are removed to reduce hazardous fuels; to reduce or contain disease or insect infestation; or to restore ecosystem health;

(ii) Would not otherwise be used for higher-value products; and

(iii) Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of paragraphs (e)(2), (e)(3), and (e)(4) and large-tree retention of paragraph (f) of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512); or

(2) Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:

(i) Renewable plant material, including feed grains; other agricultural commodities; other plants and trees; and algae; and

(ii) Waste material, including crop residue; other vegetative waste material (including wood waste and wood residues); animal waste and byproducts (including fats, oils, greases, and manure); and food waste and yard waste.

Sign-up period. The time period during which the Agency will accept enrollment applications.

Smaller producer. An eligible advanced biofuel producer with a refining capacity as determined for the prior fiscal year, based on all of the advanced biofuel facilities in which the producer has 50 percent or more ownership, equal to or less than:

(1) 150,000,000 gallons of liquid advanced biofuel per year; or

(2) 15,900,000 MMBTU of biogas and solid advanced biofuel per year.

State. Any of the 50 States of the United States, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

USDA. The United States Department of Agriculture.

§ 4288.103 Review or appeal rights.

A person may seek a review of an Agency decision or appeal to the National Appeals Division in accordance with 7 CFR part 11 of this title.

§ 4288.104 Compliance with other laws and regulations.

(a) Advanced biofuel producers must comply with other applicable Federal, State, and local laws, including, but not limited to, the Equal Employment Opportunity Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, The Age Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and 7 CFR part 1901, subpart E. This includes collection and maintenance of race, sex, and national origin data of the recipient’s employee.

(b) Producers must comply with equal opportunity and nondiscriminatory requirements in accordance with 7 CFR 15d. Rural Development

RBS and RUS, USDA

§ 4288.110

will not discriminate against an applicant on the bases of race, color, religion, national origin, sex, sexual orientation, marital status, familial status, disability, or age (provided that the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

§ 4288.105 Oversight and monitoring.

(a) *Verification.* The Agency reserves the right to verify all payment applications and subsequent payments made under this subpart, as frequently as necessary, to ensure the integrity of the Program. The Agency will conduct site visits as necessary.

(1) *Production and feedstock verification.* The Agency will review producer records to verify the type and amount of biofuel produced and the type and amount of feedstocks used.

(2) *Blending verification.* The Agency will review the producer's certificates of analysis and feedstock records to verify the portion of the advanced biofuel eligible for payment.

(3) *Certificate of Analysis.* The Agency will review the producer records for quarterly payments to ensure that each certificate of analysis has been issued by a qualified, independent third party, which may include the blender only if the blender is not associated with the facility.

(b) *Records.* For the purpose of verifying compliance with the requirements of this subpart, each eligible advanced biofuel producer shall make available at one place at a reasonable time for examination by representatives of USDA, all books, papers, records, contracts, scale tickets, settlement sheets, invoices, written price quotations, and other documents related to the Program that is within the control of such advanced biofuel producer for not less than 3 years from each Program payment date.

§ 4288.106 Forms, regulations, and instructions.

Copies of all forms, regulations, instructions, and other materials related to this Program may be obtained from

the USDA Rural Development State Office, Rural Energy Coordinator and the USDA Rural Development Web site at <http://www.rurdev.usda.gov>.

§ 4288.107 Exception authority.

The Administrator of the Agency ("Administrator") may, with the concurrence of the Secretary of Agriculture, make an exception, on a case-by-case basis, to any requirement or provision of this subpart that is not inconsistent with any authorizing statute or applicable law, if the Administrator determines that application of the requirement or provision would adversely affect the Federal government's interest.

§§ 4288.108–4288.109 [Reserved]

ELIGIBILITY PROVISIONS

§ 4288.110 Applicant eligibility.

Sections 4288.110 through 4288.119 present the requirements associated with advanced biofuel producer eligibility, biofuel eligibility, eligibility notifications, and payment record requirements. To be eligible for this Program, the applicant must meet the requirements specified in paragraph (a) of this section and must provide additional information as may be requested by the Agency under paragraph (b) of this section. Public bodies and educational institutions are not eligible for this Program.

(a) *Eligible producer.* The applicant must be an advanced biofuel producer, as defined in this subpart.

(b) *Eligibility determination.* The Agency will determine an applicant's eligibility for participation in this Program. If an applicant's original submittal is not sufficient to verify an applicant's eligibility, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application. This notification will identify, at a minimum, the additional information being requested to enable the Agency to determine the applicant's eligibility and a timeframe in which to supply the information.

(1) If the applicant provides the requested information to the Agency within the specified timeframe, the

§ 4288.111

7 CFR Ch. XLII (1–1–12 Edition)

Agency will determine the applicant's eligibility for the upcoming fiscal year.

(2) If the applicant does not provide the requested information to the Agency within the specified timeframe, the Agency will not consider the applicant any further for participation in the upcoming fiscal year. Such applicants may elect to enroll during the next sign-up period.

(c) *Ineligibility determination.* An otherwise eligible producer will be determined to be ineligible if the producer:

(1) Refuses to allow the Agency to verify any information provided by the advanced biofuel producer under this subpart, including information for determining applicant eligibility, advanced biofuel eligibility, and application payments;

(2) Fails to meet any of the conditions set out in this subpart, in the contract, or in other Program documents; or

(3) Fails to comply with all applicable Federal, State, or local laws.

§ 4288.111 Biofuel eligibility.

To be eligible for this Program, a biofuel must meet the requirements specified in paragraph (a) of this section and the biofuel's producer must provide additional information as may be requested by the Agency under paragraph (b) of this section. Notwithstanding the provisions of paragraph (a) of this section, for the purposes of this subpart, flared gases are not eligible.

(a) *Eligible advanced biofuel.* For an advanced biofuel to be eligible, each of the following conditions must be met, as applicable:

(1) The advanced biofuel must meet the definition of advanced biofuel and be produced in a State;

(2) The advanced biofuel must be a solid, liquid, or gaseous advanced biofuel;

(3) The advanced biofuel must be a final product; and

(4) The advanced biofuel must be sold as an advanced biofuel through an arm's length transaction to a third party.

(b) *Eligibility determination.* The Agency will determine a biofuel's eligibility for payment under this Program. If an applicant's original submittal is not

sufficient to verify a biofuel's eligibility, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application. This notification will identify, at a minimum, the additional information being requested to enable the Agency to determine the biofuel's eligibility and a timeframe in which to supply the information.

(1) If the applicant provides the requested information to the Agency within the specified timeframe, the Agency will determine the biofuel's eligibility for the upcoming fiscal year.

(2) If the applicant does not provide the requested information to the Agency within the specified timeframe, the biofuel will not be eligible for payment under this Program in the upcoming fiscal year. Applicants may elect to include such biofuels in the application form submitted during the next sign-up period.

§ 4288.112 Eligibility notifications.

(a) *Applicant eligibility.* If an applicant is determined by the Agency to be eligible for participation, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application and will assign the applicant a contract number.

(b) *Ineligibility notifications.* If an applicant or a biofuel is determined by the Agency to be ineligible, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application, as to the reason(s) the applicant or biofuel was determined to be ineligible. Such applicant will have appeal rights as specified in this subpart.

(c) *Subsequent ineligibility determinations.* If at any time a producer or an advanced biofuel is determined to be ineligible, the Agency will notify the producer in writing of its determination.

§ 4288.113 Payment record requirements.

To be eligible for Program payments, an advanced biofuel producer must maintain records for all relevant fiscal years and fiscal year quarters for each advanced biofuel facility indicating:

(a) The type of eligible renewable biomass used in the production of advanced biofuel;

(b) The quantity of advanced biofuel produced from eligible renewable biomass at each advanced biofuel facility;

(c) The quantity of eligible renewable biomass used at each advanced biofuel facility to produce the advanced biofuel; and

(d) All other records required to establish Program eligibility and compliance.

§ 4288.114–4288.119 [Reserved]

ENROLLMENT PROVISIONS

§ 4288.120 Enrollment.

In order to participate in the Program, a producer of advanced biofuels must be approved by the Agency and enter into a contract with the Agency. The process for enrolling in the Program is presented in this section. Advanced biofuel producers who expect to produce eligible advanced biofuels at any time during a fiscal year must enroll in the Program as described in this section.

(a) *Enrollment.* To enroll in the Program, an advanced biofuel producer must submit to the Agency a completed enrollment application during the applicable sign-up period, as specified in paragraph (b) of this section. An original, signed hard copy of the enrollment application must be submitted as specified in the annual FEDERAL REGISTER notice for this program. All applicants, except those that are individuals, are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number, which can be obtained online at <http://fedgov.dnb.com/webform>.

(1) Eligible advanced biofuel producers must submit enrollment applications during each sign-up period in order to continue participating in this Program. If a participating producer fails to submit the enrollment application during a fiscal year's applicable sign-up period, the producer's contract will be terminated and the producer will be ineligible to receive payments for that fiscal year. Such a producer must reapply, and sign a new contract, to participate in the Program for future fiscal years.

(2) Eligible advanced biofuel producers may submit an enrollment application during a fiscal year's sign-up

period even if the advanced biofuel facility is not currently producing, but is scheduled to start producing advanced biofuel in that fiscal year.

(3) The producer must furnish the Agency all required certifications before acceptance into the Program, and furnish access to the advanced biofuel producer's records required by the Agency to verify compliance with Program provisions. The required certifications depend on the type of biofuel produced. Certifications specified in paragraphs (a)(3)(i) through (a)(3)(iv) of this section are to be completed and provided by an accredited independent third party.

(i) *Alcohol.* For alcohol producers with authority from ATF to produce alcohol, copies of either

(A) The Alcohol Fuel Producers Permit (TTB F 5110.74) or

(B) The registration of Distilled Spirits Plant (TTB F 5110.41) and Operating Permit (TTB F 5110.25).

(ii) *Hydrous ethanol.* For hydrous ethanol that is upgraded by another distiller to anhydrous ethyl alcohol, the increased ethanol production is eligible for payment one time only. If the advanced biofuel producer entering into this agreement is:

(A) The hydrous ethanol producer, then the advanced biofuel producer shall include with the contract an affidavit, acceptable to the Agency, from the distiller stating that the:

(1) Applicable hydrous ethanol produced is distilled and denatured for fuel use according to ATF requirements, and

(2) Distiller will not include the applicable ethanol in any payment requests that the distiller may make under this Program.

(B) The distiller that upgrades hydrous ethanol to anhydrous ethyl alcohol, then the advanced biofuel producer shall include with the contract an affidavit, acceptable to the Agency, from the hydrous ethanol producer stating that the hydrous ethanol producer will not include the applicable ethanol in any payment requests that may be made under this Program.

(iii) *Biodiesel, biomass-based diesel, and liquid hydrocarbons derived from biomass.* For these fuels, the advanced biofuel

producer shall certify that the producer, the advanced biofuel facility, and the biofuel meet the definitions of these terms as defined in § 4288.102, the applicable registration requirements under the Energy Independence and Security Act and the Clean Air Act and under the applicable regulations of the U.S. Environmental Protection Agency and Internal Revenue Service, and the quality requirements per applicable ASTM International standards (e.g., ASTM D6751) and commercially acceptable quality standards of the local market. If a Renewable Identification Number has been established, the advanced biofuel producer shall also provide documentation of the most recent Renewable Identification Number for a typical gallon of each type of advanced biofuel produced.

(iv) *Gaseous advanced biofuel.* For gaseous advanced biofuel producers, certification that the biofuel meets commercially acceptable pipeline quality standards of the local market; that the flow meters used to determine the quantity of advanced biofuel produced are industry standard and properly calibrated by a third-party professional; and that the readings have been taken by a qualified individual.

(v) *Woody biomass feedstock.* If the feedstock is from National Forest system land or public lands, documentation must be provided that it cannot be used as a higher value wood-based product.

(4) *Supporting documentation.* Each advanced biofuel producer participating in this program for the first time must submit documentation to support the actual production and capacity reported in the enrollment application.

(5) *Additional forms.* Applicants must submit the forms specified in this paragraph with the enrollment application when applying for participation under this subpart and as needed when re-enrolling in the program.

(i) RD Instruction 1940–Q, Exhibit A–1, “Certification for Contracts, Grants and Loans.”

(ii) SF–LLL, “Disclosure of Lobbying Activities.”

(iii) Form RD 400–4, “Assurance Agreement.”

(b) *Sign-up period.* The sign-up period is October 1 to October 31 of the fiscal

year for which payment is sought, unless otherwise announced by the Agency in a FEDERAL REGISTER notice.

§ 4288.121 Contract.

Advanced biofuel producers determined to be eligible to receive payments must then enter into a contract with the Agency in order to participate in this Program.

(a) *Contract.* The Agency will forward the contract to the advanced biofuel producer. The advanced biofuel producer must agree to the terms and conditions of the contract, sign, date, and return it to the Agency within the time provided by the Agency.

(b) *Length of contract.* Once signed, a contract will remain in effect until terminated as specified in paragraph (d) of this section.

(c) *Contract review.* All contracts will be reviewed at least annually to ensure compliance with the contract and ensure the integrity of the program.

(d) *Contract termination.* Contracts under this Program will be terminated in writing by the Agency. Contracts may be terminated under any one of the following conditions:

(1) At the mutual agreement of the parties;

(2) In accordance with applicable Program notices and regulations;

(3) The advanced biofuel producer withdraws from the Program and so notifies the Agency, in writing;

(4) The advanced biofuel producer fails to submit the enrollment application during a sign-up period;

(5) The Program is discontinued or not funded;

(6) All of a participating advanced biofuel producer’s advanced biofuel facilities no longer exist or no longer produce any eligible advanced biofuel; or

(7) The Agency determines that the advanced biofuel producer is ineligible for participation.

§§ 4288.122–4288.129 [Reserved]

PAYMENT PROVISIONS

§ 4288.130 Payment applications.

Sections 4288.130 through 4288.189 identify the process and procedures the Agency will use to make payments to eligible advanced biofuel producers. In

order to receive payments under this Program, eligible advanced biofuel producers with valid contracts must submit a payment application, as required under paragraph (a) of this section. The Agency will review the payment application and, if necessary, may request additional information, as specified under paragraph (b) of this section.

(a) *Applying for payment.* To apply for payments under this subpart for a fiscal year, an eligible advanced biofuel producer must:

(1) After a quarter has been completed, submit a payment application covering the quarter;

(2) Certify that the request is accurate;

(3) Furnish the Agency such certification, and access to such records, as the Agency considers necessary to verify compliance with Program provisions; and

(4) Provide documentation as requested by the Agency of the net production of advanced biofuel at all advanced biofuel facilities during the relevant quarter.

(b) *Review of payment applications.* The Agency will review each payment application it receives to determine if it is eligible for payment.

(1) *Review factors.* Factors that the Agency will consider in reviewing payments applications include, but are not necessarily limited to:

(i) *Contract validity.* Whether the entity submitting the payment application has a valid contract with the Agency under this Program;

(ii) *Biofuel eligibility.* Whether the biofuel for which payment is sought is an eligible advanced biofuel; and

(iii) *Calculations.* Whether the calculations for determining the requested payment are complete and accurate.

(2) *Additional documentation.* If the Agency determines additional information is required for the Agency to complete its review of a payment application, eligible advanced biofuel producers shall submit such additional supporting documentation as requested by the Agency. If the producer does not provide the requested information within the required time period, the Agency will not make payment.

(c) *Payment application eligibility.* The Agency will notify the advanced biofuel producer, in writing, as soon as practicable after the payment application, whenever the Agency determines that a payment application, or any portion thereof, is ineligible for payment and the basis for the Agency's determination of ineligibility.

(d) *Submittal information.* Eligible advanced biofuel producers must submit payment applications as specified in the annual FEDERAL REGISTER notice for this program no later than 4:30 p.m. local time on the last day of the calendar month following the quarter for which payment is being requested. Neither complete nor incomplete payment applications received after this date and time will be considered, regardless of the postmark on the application.

(1) Any payment application form that is received by the Agency after October 31 of the calendar year for the preceding fiscal year is ineligible for payment.

(2) If the actual deadline falls on a weekend or a Federally-observed holiday, the deadline is the next Federal business day.

§ 4288.131 Payment provisions.

Payments to advanced biofuel producers for eligible advanced biofuel production will be determined in accordance with the provisions of this section.

(a) *Types of payments.* The Agency will make available each fiscal year an actual production payment and an incremental production payment to participating producers, as specified in paragraphs (a)(1) and (a)(2), respectively, of this section. As provided in paragraph (a)(2) of this section, not all participating producers will receive an incremental production payment.

(1) *Actual production.* Participating producers will be paid on a quarterly basis for the actual quantity of eligible advanced biofuel produced during the quarter. Payment for actual production will be determined according to paragraph (c) of this section.

(2) *Incremental production.* For each participating advanced biofuel facility, the Agency will make an end-of-the-year payment for that facility's incremental production, if any, during the

fiscal year provided the advanced biofuel facility has fewer than 20 days (excluding weekends) of non-production of eligible advanced biofuels during the previous fiscal year. Payment for incremental production will be determined according to paragraph (d) of this section.

(b) *Amount of payment funds available.* Based on the amount of funds made available to this program each fiscal year, the Agency will allocate available program funds according to paragraphs (b)(1) and (b)(2) of this section.

(1) *Actual versus incremental production.* The Agency will determine the amount of funds for actual production payments and for incremental production payment as follows:

(i) For fiscal year 2010, 80 percent of the funds will be allocated for actual production payments and 20 percent of the funds will be allocated for incremental production payments.

(ii) For fiscal year 2011, 70 percent of the funds will be allocated for actual production payments and 30 percent of the funds will be allocated for incremental production payments.

(iii) For fiscal year 2012, 60 percent of the funds will be allocated for actual production payments and 40 percent of the funds will be allocated for incremental production payments.

(iv) For fiscal year 2013 and beyond, 50 percent of the funds will be allocated for actual production payments and 50 percent of the funds will be allocated for incremental production payments.

(2) *Quarterly allocations.* For each fiscal year, the Agency will allocate in each quarter one-fourth of the funds allocated to actual production for the entire fiscal year.

(c) *Determination of payment for actual production.* Each quarter, the Agency will establish an actual production payment rate using the procedures specified in paragraphs (c)(1) through (c)(5) of this section. This rate will be applied to the actual quantity of eligible advanced biofuel produced to determine payments to eligible advanced biofuel producers, as described in paragraph (c)(6) of this section.

(1) Based on the information provided in each payment application, the Agency will determine the eligible advanced biofuel production. If the Agency deter-

mines that the amount of advanced biofuel production reported in a payment application is not supported by the documentation submitted with the payment application, the Agency may reduce the production reported in the payment application.

(2) For each producer, the Agency will convert the production determined to be eligible under paragraph (c)(1) of this section into British Thermal Unit (BTU) equivalent using factors published by the Energy Information Administration (or successor organization). If the Energy Information Administration does not publish such conversion factor for a specific type of advanced biofuel, the Agency will use a conversion factor developed by another appropriate entity. If no such conversion factor exists, the Agency will, in consultation with other Federal agencies, establish and use a conversion formula as appropriate, that it publishes in the FEDERAL REGISTER, until such time as the Energy Information Administration or other appropriate entity publishes a conversion factor for said advanced biofuel. The Agency will then calculate the total eligible BTUs across all eligible applications.

(i) If the advanced biofuel is a liquid or gaseous advanced biofuel produced from forest biomass, the BTUs will be discounted 10 percent.

(ii) If the advanced biofuel is a solid advanced biofuel produced from forest biomass, the BTUs will be discounted 85 percent.

(iii) If the advanced biofuel meets an applicable renewable fuel standard, the BTUs will be increased by 10 percent.

(3) For each quarter, the Agency will determine the actual production payment rate (\$/BTU) based on paragraphs (b) and (c)(2) of this section. The rate will be calculated such that all of the quarterly funds for actual production will be distributed.

(4) Using the actual production payment rate determined above and the actual production for each type of advanced biofuel produced at an advanced biofuel facility, the Agency will calculate each quarter a payment for each eligible advanced biofuel producer for that quarter.

(d) *Determination of payment for incremental production.* At the end of each

fiscal year, the Agency will establish incremental production payment rate using the procedures specified in paragraphs (d)(1) through (d)(6) of this section. This rate will be applied to the quantity of eligible incremental advanced biofuel produced to determine payments to eligible advanced biofuel producers, as described in paragraph (d)(7) of this section.

(1) For each participating advanced biofuel facility that produced eligible advanced biofuels during the fiscal year prior to the fiscal year for which payment is sought provided the advanced biofuel facility has fewer than 20 days (excluding weekends) of non-production of eligible advanced biofuels during that previous fiscal year, the Agency will determine the quantity of eligible advanced biofuel produced in that prior fiscal year based on information provided by the producer.

(2) Using the information in the payment applications submitted for the fiscal year for which payment is sought, the Agency will determine the actual amount of eligible advanced biofuel produced in the fiscal year for which payment is sought.

(3) Using the results from paragraphs (d)(1) and (d)(2) of this section, the Agency will determine the quantity of advanced biofuel produced in excess of the previous year's advanced biofuel production.

(4) For each advanced biofuel facility that shows incremental production under paragraph (d)(3) of this section, the Agency will convert the production into British Thermal Unit (BTU) equivalent using factors published by the Energy Information Administration (or successor organization). If the Energy Information Administration does not publish such conversion factor for a specific type of advanced biofuel, the Agency will use a conversion factor developed by another appropriate entity. If no such conversion factor exists, the Agency will establish and use a conversion formula as appropriate, that it publishes in the FEDERAL REGISTER, until such time as the Energy Information Administration or other appropriate entity publishes a conversion factor for said advanced biofuel. The Agency will then calculate the total el-

igible BTUs across all eligible applications.

(i) If the advanced biofuel is a liquid or gaseous advanced biofuel produced from forest biomass, the BTUs will be discounted 10 percent.

(ii) If the advanced biofuel is a solid advanced biofuel produced from forest biomass, the BTUs will be discounted 85 percent.

(iii) If the advanced biofuel meets an applicable renewable fuel standard, the BTUs will be increased by 10 percent.

(5) The Agency will sum all of the BTUs determined under paragraph (d)(4) of this section.

(6) Using the results from paragraph (d)(5) of this section and the amount of incremental funds available, the Agency will determine the incremental production payment rate (\$/BTU). The rate will be calculated such that all of the incremental production funds will be distributed.

(7) Using the incremental production payment rate determined above and the incremental production for each advanced biofuel facility eligible for an incremental production payment, the Agency will calculate an incremental production payment for each eligible advanced biofuel producer.

(e) *Other payment provisions.* The following provisions apply.

(1) Notwithstanding any other provision, the Agency will provide payments to larger producers of not more than 5 percent of available program funds in any fiscal year. At any time during the year, if the limit on payments to larger producers would be reached, the Agency will pro-rate payments to larger producers based on the BTU content of their eligible advanced biofuel production so as not to exceed the limit.

(2) Notwithstanding any other provision, the Agency will provide payments to solid eligible advanced biofuels produced from forest biomass of not more than 5 percent of available program funds in any fiscal year. At any time during the year, if the limit on payments to such advanced biofuels would be reached, the Agency will pro-rate payments for such advanced biofuels based on the BTU content of the quantity of such advanced biofuels produced so as not to exceed the limit.

§ 4288.132

7 CFR Ch. XLII (1–1–12 Edition)

(3) Advanced biofuel producers will be paid on the basis of the amount of eligible renewable energy content of the advanced biofuels only if the producer provides documentation sufficient, including a Certificate of Analysis, for the Agency to determine the eligible renewable energy content for which payment is being requested, and quantity produced through such documentation as, but not limited to, records of sale and calibrated flow meter records.

(4) Payment will be made to only one eligible advanced biofuel producer per advanced biofuel facility.

(5) Subject to other provisions of this section, advanced biofuel producers shall be paid any sum due subject to the requirements and refund provisions of this subpart.

(6) Advanced biofuels produced under the situations identified in paragraphs (e)(6)(i) through (e)(6)(iii) of this section are ineligible for incremental production payment, but are still eligible for actual production payment.

(i) Advanced biofuels produced at an advanced biofuel facility that did not produce any eligible advanced biofuel in year prior to the fiscal year in which payment is sought (e.g., a new advanced biofuel facility).

(ii) Advanced biofuels produced at an advanced biofuel facility that had 20 or more days (excluding weekends) of non-production of eligible advanced biofuels during the fiscal year immediately prior to the fiscal year in which payment is sought.

(iii) Advanced biofuels produced from forest biomass.

(iv) For larger producers only, when all of the funds available to larger producers have been distributed based on actual production.

(7) If an advanced biofuel producer transfers any production capacity for one advanced biofuel facility to another, such transferred production capacity shall be considered production for the advanced biofuel facility to which the production was transferred.

(8) A producer will only be paid for the advanced biofuels identified in the enrollment application submitted during the sign-up period and which are actually produced during the fiscal year. If the producer starts producing a

new advanced biofuel or changes the type of advanced biofuel during the fiscal year, the producer will not receive any payments for those new advanced biofuels. However, during each sign-up period, a producer can identify new advanced biofuels and production levels compared to the previous year.

(9) When determining the quantity of eligible advanced biofuel, if an applicant is blending its advanced biofuel using ineligible feedstocks (e.g., fossil gasoline or methanol, corn kernel starch), only the quantity of advanced biofuel being produced from eligible feedstocks will be used in determining the payment rates and for which payments will be made.

§ 4288.132 Payment adjustments.

The Agency will adjust the payments otherwise payable to the advanced biofuel producer if there is a difference between the amount actually produced and the amount determined by the Agency to be eligible for payment.

§ 4288.133 Payment liability.

Any payment, or portion thereof, made under this subpart shall be made without regard to questions of title under State law and without regard to any claim or lien against the advanced biofuel, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government.

§ 4288.134 Refunds and interest payments.

An eligible advanced biofuel producer who receives payments under this subpart may be required to refund such payments as specified in this section. If the Agency suspects fraudulent representation through its site visits and records inspections under § 4288.105(b), it will be referred to the Office of Inspector General for appropriate action.

(a) An eligible advanced biofuel producer receiving payments under this subpart shall become ineligible if the Agency determines the advanced biofuel producer has:

- (1) Made any fraudulent representation; or
- (2) Misrepresented any material fact affecting a Program determination.

(b) If an Agency determination that a producer is not eligible for participation under this subpart is appealed and overturned, the Agency will make appropriate and applicable payments to the producer from Program funds, to the extent such funds are available, that remain from the fiscal year in which the original adverse Agency decision was made.

(c) All payments made to an entity determined by the Agency to be ineligible shall be refunded to the Agency with interest and other such sums as may become due, including, but not limited to, any interest, penalties, and administrative costs as determined appropriate under 31 CFR 901.9.

(d) When a refund is due, it shall be paid promptly. If a refund is not made promptly, the Agency may use all remedies available to it, including Treasury offset under the Debt Collection Improvement Act of 1996, financial judgment against the producer, and referral to the Department of Justice.

(e) Late payment interest shall be assessed on each refund in accordance with the provisions and rates as established by the United States Treasury.

(1) Interest charged by the Agency under this subpart shall be established by the United States Treasury. Such interest shall accrue from the date such payments were made by the Agency to the date of repayment by the producer.

(2) The Agency may waive the accrual of interest or damages if the Agency determines that the cause of the erroneous payment was not due to any action of the advanced biofuel producer.

(f) Any advanced biofuel producer or person engaged in an act prohibited by this section and any advanced biofuel producer or person receiving payment under this subpart shall be jointly and severally liable for any refund due under this subpart and for related charges.

§ 4288.135 Unauthorized payments and offsets.

When unauthorized assistance has been made to an advanced biofuel producer under this Program, the Agency reserves the right to collect from the recipient the sum that is determined to

be unauthorized. If the recipient fails to pay the Agency the unauthorized assistance plus other sums due under this section, the Agency reserves the right to offset that amount against Program payments.

(a) *Unauthorized assistance.* The Agency will seek to collect from recipients all unauthorized assistance made under this Program using the procedures specified in paragraphs (a)(1) through (a)(4) of this section.

(1) *Notification to the producer.* Upon determination that unauthorized assistance has been made to an advanced biofuel producer under this Program, the Agency will send a demand letter to the producer. Unless the Agency modifies the original demand, it will remain in full force and effect. The demand letter will:

(i) Specify the amount of unauthorized assistance, including any accrued interest to be repaid, and the standards for imposing accrued interest;

(ii) State the amount of penalties and administrative costs to be paid, the standards for imposing them and the date on which they will begin to accrue;

(iii) Provide detailed reason(s) why the assistance was determined to be unauthorized;

(iv) State the amount is immediately due and payable to the Agency;

(v) Describe the rights the producer has for seeking review or appeal of the Agency's determination pursuant to 7 CFR part 11;

(vi) Describe the Agency's available remedies regarding enforced collection, including referral of debt delinquent after due process for Federal salary, benefit and tax offset under the Department of Treasury Offset Program; and

(vii) Provide an opportunity for the producer to meet with the Agency and to provide to the Agency facts, figures, written records, or other information that might refute the Agency's determination.

(A) If the producer meets with the Agency, the producer will be given an opportunity to provide information to refute the Agency's findings.

(B) When requested by the producer, the Agency may grant additional time

for the producer to assemble documentation. Such extension of time for payment will be valid only if the Agency documents the extension in writing and specifies the period in days during which period the payment obligation created by the demand letter (but not the ongoing accrual of interest) will be suspended. Interest and other charges will continue to accrue pursuant to the initial demand letter during any extension period unless the terms of the demand letter are modified in writing by the Agency.

(2) *Payment in full.* If the producer agrees with the Agency's determination or will pay the amount in question, the Agency may allow a reasonable period of time (usually not to exceed 90 days) for the producer to arrange for repayment. The amount due will be the unauthorized payments made plus interest accrued beginning on the date of the demand letter at the interest rate stipulated until the date paid unless otherwise agreed, in writing, by the Agency.

(3) *Promissory note.* If the producer agrees with the Agency's determination or is willing to pay the amount in question, but cannot repay the unauthorized assistance within a reasonable period of time, the Agency will convert the unauthorized assistance amount to a loan provided all of the conditions specified in paragraphs (a)(3)(i) through (a)(3)(iii) of this section are met. Loans established under this paragraph will be at the Treasury interest rate in effect on the date the financial assistance was provided and that is consistent with the term length of the promissory note. In all cases, the receivable will be amortized per a repayment schedule satisfactory to the Agency that has the producer pay the unauthorized assistance as quickly as possible, but in no event will the amortization period exceed fifteen (15) years. The producer will be required to execute a debt instrument to evidence this receivable, and the best security position practicable in a manner that will adequately protect the Agency's interest during the repayment period will be taken as security.

(i) The producer did not provide false information;

(ii) It would be highly inequitable to require prompt repayment of the unauthorized assistance; and

(iii) Failure to collect the unauthorized assistance immediately will not adversely affect the Agency's interests.

(4) *Appeals.* Appeals resulting from the demand letter prescribed in paragraph (a)(1) of this section will be handled according to the provisions of § 4288.103. All appeal provisions will be concluded before proceeding with further actions.

(b) *Offsets.* Failure to make payment as determined under paragraph (a) of this section will be treated by the Agency as a debt that can be collected by an Administrative offset, unless written agreements to repay such debt as an alternative to administrative offset is agreed to between the Agency and the producer.

(1) Any debtor who wishes to reach a written agreement to repay the debt as an alternative to administrative offset must submit a written proposal for repayment of the debt, which must be received by the Agency within 20 calendar days of the date the notice was delivered to the debtor. In response, the Agency will notify the debtor in writing whether the proposed agreement is acceptable. In exercising its discretion, the Agency will balance the Government's interest in collecting the debt against fairness to the debtor.

(2) When the Agency receives a debtor's proposal for a repayment agreement, the offset is stayed until the debtor is notified as to whether the initial agreement is acceptable. If a Government payment will be made before the end of the fiscal year and the review is not yet completed, payment will be deferred pending resolution of the review.

§ 4288.136 Remedies.

In addition to the steps available under the provisions of §§ 4288.134 and 4288.135, if the Agency has determined that a producer has misrepresented the information or defrauded the Government, the Agency will take one of the following steps in accordance to 7 CFR part 3017, Government-wide Debarment and Suspension:

RBS and RUS, USDA

Pt. 4290

- (a) Suspend payments on the Contract until the violation has been recoupled;
- (b) Terminate the Contract; or
- (c) Debarment to participate in any Federal Government program.

§ 4288.137 Succession and loss of control of advanced biofuel facilities and production.

(a) *Contract succession.* An entity who becomes the eligible advanced biofuel producer for an advanced biofuel facility that is under contract under this subpart must request permission from the Agency to succeed to the Program contract and the Agency may grant such request if it is determined that the entity is an eligible producer and permitting such succession would serve the purposes of the Program. If appropriate, the Agency may require the consent of the previous eligible advanced biofuel producer to such succession.

(b) *Loss of control.* Payments will be made only for eligible advanced biofuels produced at an advanced biofuel facility owned or controlled by an eligible advanced biofuel producer with a valid contract. If payments are made to an advanced biofuel producer for production at an advanced biofuel facility no longer owned or controlled by said producer or to an otherwise ineligible advanced biofuel producer, the Agency will demand full refund of all such payments.

§§ 4288.138–4288.189 [Reserved]

FISCAL YEAR 2010 APPLICATIONS

§ 4288.190 Fiscal Year 2010 applications.

(a) *General.* This section provides the requirements associated with applying for funds under this subpart for Fiscal Year 2010.

(b) *Applicability.* The provisions specified in §§ 4288.101 through 4288.137 are applicable to applicants, applications, and awards made for Fiscal Year 2010, except as follows:

(1) Applications for participation in this program must be received by May 6, 2011. Applications received after this date will not be considered by the Agency for Fiscal Year 2010 funding.

(2) Payment applications for Fiscal Year 2010 funding are due by 4:30 p.m. local time May 12, 2011. Any application received after this date and time is ineligible for payment.

(3) Payment applications for Fiscal Year 2010 funding must contain actual production for October 1, 2009 through September 30, 2010.

(4) If an applicant has submitted an application for participation or payment in this program for Fiscal Year 2010 funding prior to March 14, 2011, the applicant must submit new applications in accordance with this subpart for Fiscal Year 2010 funding.

[76 FR 7967, Feb. 11, 2011, as amended at 76 FR 24343, May 2, 2011]

§§ 4288.191–4288.200 [Reserved]

PART 4290—RURAL BUSINESS INVESTMENT COMPANY (“RBIC”) PROGRAM

Subpart A—Introduction to Part 4290

- Sec. 4290.10 Description of the Rural Business Investment Company Program.
- 4290.15 Leveraged and non-leveraged rural business investment companies.
- 4290.20 Legal basis and applicability of this part 4290.
- 4290.30 Amendments to Act and regulations.
- 4290.40 How to read this part 4290.
- 4290.45 Responsibility for implementing this part 4290.

Subpart B—Definition of Terms Used in Part 4290

- 4290.50 Definition of terms.

Subpart C—Qualifications for the RBIC Program

ORGANIZING A RBIC

- 4290.100 Business form.
- 4290.110 Qualified management.
- 4290.120 Plan to invest in Rural Areas.
- 4290.130 Identified Rural Areas.
- 4290.140 Approval of initial Management Expenses.
- 4290.150 Management and ownership diversity requirement.
- 4290.160 Special rules for Partnership RBICs and LLC RBICs.
- 4290.165 Obligations of Control Persons.

CAPITALIZING A RBIC

- 4290.200 Adequate capital for RBICs.